

BEFORE THE BOARD OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR
RESERVATION OF WATER NO. 9947-r42M
BY THE NORTH CUSTER CONSERVATION
DISTRICT

} FINDINGS OF FACT AND CON-
} CLUSIONS OF LAW OF APPLI-
} CATION NO. 9947-r42M
}

The above-entitled matter came on regularly for hearing starting on or about September 8, 1977, in Billings, Montana, before the Montana Board of Natural Resources and Conservation and its duly appointed Hearing Examiner, James Driscoll. The Applicant appeared by and through its counsel of record, Gary Spaeth. The Montana Department of Natural Resources and Conservation appeared by and through its counsel of record, Richard Gordon. The Montana Department of Fish and Game appeared by and through its counsel of record, R. Woodside Wright and Clayton Herron. The Montana Department of Health and Environmental Sciences appeared by and through its counsel of record, Mona Jamison. Utah International, Inc., appeared by and through its counsel of record, Urban Roth. Intake Water Company appeared by and through its counsel of record, Henry Loble. Witnesses were duly sworn, and oral and documentary evidence was introduced.

The Board, having read and fully considered the complete record, makes the following Findings of Fact and Conclusions of Law relating to the North Custer Conservation District, Application No. 9947-r42M:

FINDINGS OF FACT

1. Table NCCD-1 summarizes the request for reserved water made by the North Custer Conservation District for the year 2007 (Application No. 9947-r42M, Table 1, on p. 13 and amended Table 1).

TABLE NCCD-1

NORTH CUSTER CONSERVATION DISTRICT RESERVATION REQUEST

Source	Type of Irrigation			Totals	
	Full-Service Irrigation	Water-spreading	Acres	af/y	cfs
Yellowstone River					
Number of acres to be Irrigated	7,440	0	7,440		
Water Request in Acre-Feet per year	18,301	0		18,301	
Maximum Diversionary Flow rate in cfs	123.4	0			123.4
Tongue River					
Number of Acres to be Irrigated	4,605	0	4,605		
Water Request in Acre-feet per year	10,897	0		10,897	
Maximum Diversionary Flow rate in cfs	66.8	0			66.8
Powder Mainstem					
Number of Acres to be Irrigated	26,150	2,585	28,735		
Water Request in Acre-feet per year	78,480	3,878		82,358	
Maximum Diversionary Flow rate in cfs	566.9	129.3			696.2
Powder Tributaries					
Number of Acres to be Irrigated	0	4,200	4,200		
Water Request in Acre-feet per year	0	6,300		6,300	
Maximum Diversionary Flow rate in cfs	0	420			420
TOTALS			44,980	117,856	1,306.4

Findings Related to the Purpose of this Reservation (89-890(3)(a)).

2. The purpose of the reservation is to insure water availability and adequate streamflow for the future agricultural needs of the North Custer Conservation District. (The North Custer Conservation District Application at page 5).

3. It is established to the satisfaction of the Board that a purpose of the reservation has been shown (Finding 2).

Findings Related to the Need for the Reservation (89-890(3)(b)).

4. A reservation of water is needed because it will secure a priority date for future developments that is earlier than the priority dates such developments would have if permits were obtained immediately before construction or use began (North Custer Conservation District, Application No. 9947-r42M, p. 7).

5. The reservation is needed because there is a proliferating world-wide demand for food, which is dependent on sufficient water availability (The North Custer Conservation District Application at page 4).

6. A reservation is needed because there is competition for water in the Yellowstone River Basin which may affect the availability of the Applicant to obtain a water right by permit in the future. This, in turn, will also help promote the necessary planning (The North Custer Conservation District Application at page 7).

7. It is established to the satisfaction of the Board that the need for a reservation of water has been shown (Findings 4 and 5).

Findings Related to the Amount of Water Necessary for the Purpose of the Reservation (89-890(3)(c)).

8. The amount of water necessary for this reservation is the amount required to irrigate the number of acres described in this application that can reasonably be expected to be completed by the North Custer Conservation District by the year 2007 (EIS).

9. The payment capacity consists of total farm revenue minus all costs except irrigation water costs and is the maximum amount a water user could pay for water

while maintaining a profitable operation (North Custer Conservation District, Application No. 9947-r42M, p. 20).

10. The cropping pattern by percent is 13% for grain and 61% for hay, 8% for silage and 13% for cash crop in the Kinsey area, 19% for grain, 55% for hay, 5% for silage, and 11% for cash crops in the Tongue River Basin, and 12% for grain, 72% for hay, 6% for silage, and 10% for cash crop in the Powder River Basin (North Custer Conservation District Application at p. 12).

11. A 75% on-farm irrigation efficiency was assumed for sprinkler irrigation and 55% for flood irrigation (The North Custer Conservation District Application at p. 12).

12. Conveyance losses were estimated by formula and included in the diversionary requirements needs (The North Custer Conservation District Application at page 12).

13. Peak Diversion requirements were calculated using recommended peak consumption use rates for alfalfa divided by the on-farm efficiency (The North Custer Conservation District Application at page 12).

14. The North Custer Conservation District has requested 10,897 acre-feet per year (af/y) and a peak flow rate of 66.8 cubic feet per second (cfs) of its total applied for amount to irrigate 4,605 acres with water from the Tongue River (North Custer Conservation District, Application 9947-r42M, p. 13; Finding 1).

15. Without additional storage, sufficient unappropriated water is not available to provide the requested water for the expansion of irrigation in the Tongue River Subbasin (Draft EIS, Vol. II, p. 265; North Custer Conservation District, Application No. 9947-r42M, p. 14).

16. The North Custer Conservation District has no plans for the provision of such needed storage in the Tongue River Subbasin (North Custer Conservation District, Application 9947-r42M).

17. Neither individual irrigators nor groups of irrigators alone could afford to pay for the storage needed in the Tongue River Subbasin (Draft EIS, Vol. II, p. 247).

18. The Montana Department of Natural Resources and Conservation has applied for a reservation of all the unappropriated water in the Tongue River in order to provide such needed storage to all existing and potential water users in the Tongue River Subbasin by enlarging the Department's existing and presently fully committed Tongue River Reservoir storage facility (Draft Addendum EIS, p. 15).

19. A condition of the water reservation given to the Department of Natural Resources is that part of the reservation is to be used to satisfy the request of the North Custer Conservation District from the Tongue River (Order of Board).

20. Unless reservoirs are built and stored water is made available to irrigators, no water is available for additional full-service irrigation in the Powder River Subbasin (North Custer Conservation District, Application No. 9947-r42M, pp. 14 and 15; North Custer Conservation District, Application No. 9947-r42M, Addendum No. 2).

21. The North Custer Conservation District has no established plan for providing the storage necessary to irrigate the acres that would use water from the Powder River.

22. It has not been established to the satisfaction of the Board that reservoirs for storage will be constructed and therefore the Board does not grant a water reservation for full-service irrigation from the Powder River.

23. Sufficient water is available from the Yellowstone River to irrigate the projects that will take water from the Yellowstone River (Draft EIS, Vol. II, pp. 276 and 284).

24. The North Custer Conservation District has applied for a reservation of 18,301 acre-feet per year from the Yellowstone River to irrigate 7,440 acres. (Application No. 9947-r42M, p. 4).

25. This diversion requirement ranges from .49 cfs per 40 acres to 1.00 cubic feet per second for 40 acres with an annual requirement ranging from 2.18 acre-feet per acre to 3.40 acre-feet per acre for an average of 2.46 acre-feet per acre and a

maximum flow rate of 1 cfs per 60.29 acres (Custer Conservation District Application at page 13, and Addendum 1 of the Amended Application).

26. Using irrigation factors of 2.46 acre-feet per acre, a reservation of water from the Yellowstone River sufficient to irrigate 7,440 acres would be 18,301 acre-feet per year and would be the amount necessary for the purpose of the reservation for the year 2007.

27. The North Custer Conservation District has applied for a water reservation from the Powder River and some of its tributaries for the purpose of irrigating 2,585 acres from water from the Powder River and 4,200 acres from water from tributaries of the Powder River by use of waterspreading (Application No. 9947-r42M).

28. It is established to the satisfaction of the Board that 1.5 acre-feet per acre is the amount of water necessary to properly irrigate acreage by use of waterspreading.

29. It is established to the satisfaction of the Board that the amount of the water to meet the purpose of the reservation of irrigating by waterspreading with water from the Powder River for 2,585 acres and water from tributaries of the Powder River for 4,200 acres is 10,177 acre-feet per year.

30. It is established to the satisfaction of the Board that the amount of water necessary to meet the purpose of the reservation is as follows:

- a) 18,301 acre-feet per year from the Yellowstone River
- b) 10,177 acre-feet per year from the Powder River and tributaries of the Powder River and to be used for waterspreading.

31. It is further established by the Board that a condition of the water reservation granted to the Department of Natural Resources for the Tongue River will be to provide the water for the request from the Tongue River of the North Custer Conservation District of 10,897 af/y for 4,605 acres.

Findings Related to the Public Interest (89-890(3)(d)).

32. The reservation will contribute economically to the public interest (The North Custer Conservation District Application at page 9).

33. The development of future irrigation projects in North Custer County and beneficial use of water will create jobs and increase the tax revenues (The North Custer Conservation District Application at page 9).

34. From 1960 to 1970, the rural population in North Custer County declined 11.5 percent. A major reason was a lack of job opportunities (Draft EIS, Vol. I, p. 101).

35. The development of new pumping facilities, ditches, canals, sprinkler systems, and other diversions will contribute to the economic stability of the County. (The North Custer Conservation District Application at page 9).

36. New irrigation would increase income in North Custer County, both for the farmers who would install the systems and for the local businesses that would enjoy increased sales resulting from the increase in agricultural income. New irrigation would increase the number of both on-farm and off-farm jobs. (Draft EIS, Vol. I, p. 156).

37. The North Custer Conservation District has an established plan for completion of the proposed facilities which will put reserved water to use by the year 2007 (North Custer Conservation District, Application No. 9947-r42M, pp. 21 and 24).

38. By reserving water for future beneficial use, individual ranchers and farmers have a more favorable timetable in which to accumulate the capital needed to finance, to take maximum advantage of favorable changes in the agricultural market, or to utilize the most contemporary technology available in water delivery systems. (North Custer Conservation District Application at pages 5 and 6).

39. The plan of the North Custer Conservation District is not speculative and is documented to the highest degree of detail possible. (North Custer Conservation District).

40. The reservation shall be put to use within reasonable diligence and the

plan includes a bona fide intent and ability to use the water reserved as projected.

41. Detailed planning of district projects will be accomplished through funds made available by the Montana Legislature or North Custer County mill levy. The Department of Natural Resources and Conservation's Technical Assistance Program will also be used. (The North Custer Conservation District Application at page 3).

42. The Board is satisfied there will be progress toward completion of construction of the facilities with reasonable diligence according to an established plan which includes the economic feasibility of each project, a soils and land classification analysis showing the suitability of lands to sustain irrigation, and possible sources of funding.

43. It is established to the satisfaction of the Board that the reservations stated in Finding 30 are in the public interest.

CONCLUSIONS OF LAW

1. Chapter 8, Title 89, R.C.M. 1947, and in particular, Section 89-890, R.C.M. 1947, authorizes the adoption by the Montana Board of Natural Resources and Conservation of orders reserving water to qualified applicants for reservations of water.

2. If ordered adopted, a reservation must be ordered adopted in accordance with Chapter 3, Title 89, R.C.M. 1947, and any rules adopted thereunder.

3. The Applicant, the North Custer Conservation District, is a political subdivision of the State of Montana and as such is entitled to apply to reserve waters within the State of Montana in accordance with Section 89-890, R.C.M. 1947, and any rules adopted thereunder.

4. All pertinent statutes and rules of the State of Montana have been adhered to in the review of this reservation Application, both by the Montana Department of Natural Resources and Conservation and by the Montana Board of Natural Resources and Conservation.

5. Based upon the above Findings of Fact, and specifically based upon any condition, limitation, or modification of the full Application appearing in said Findings, all pertinent criteria delineated at Section 89-890, R.C.M. 1947, and any rules adopted thereunder providing for the adoption of an order reserving water have been met.

6. Nothing found herein has bearing upon the status of water rights claimed by the Applicant other than those herein newly applied for, nor does anything found herein have bearing on the status of claimed water rights of any other party except in relation to those rights herein newly applied for, to the extent necessary to reach a conclusion herein.